IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 107 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes except [ ] portion

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?NO

Registrar to note and intimate the concerned departments.

SUNDARAM FINANCE LTD.

Versus

GOVIND SWARUP MITTAL

Appearance:

MR BR GUPTA for Petitioner

MR YF MEHTA for Respondent No. 1

NOTICE NOT RECD BACK for Respondent No. 2

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 22/23-7-98.

ORAL JUDGEMENT

A preliminary point of maintainability of this appeal from order has been raised on behalf of the respondents. Their say is that the first appeal would be an appropriate proceedings against the impugned judgment and award. For the purpose of deciding this preliminary question, it would be necessary to set out the facts in brief.

2. On 9th April, 1993, the first respondent approached the appellant M/s. Sundaram Finance Ltd. for the purchase of TATA CHASSIS from a dealer at Ahmedabad and as a consequence thereof, the first respondent entered into Hire Purchase Agreement dated 10th April, 1993 with the appellant. The second respondent joined in the said Agreement as a guarantor. It has been the case of the appellant that the entire price for the chassis was paid by the appellant to the dealer whereas according to the first respondent, out of the Invoice of Rs. 3,76,069.11, the respondent made initial payment of Rs. 76,011.69 and made the balance payment of Rs.3,00,000/through the finance provided under the Hire Purchase Agreement in question. The first respondent saw to building of the truck body on the Chassis and he was using the same. Total hire purchase was Rs.4,07,000/repayable in 29 monthly instalments commencing from 10th May, 1993. It has been the case of the respondent No. 1 that the said amount included the finance charges (apportioned on the allocated amount of interest) in the sum of Rs.1,07,400/-. There was an agreement to the effect that additional finance charge at the rate of 36% p.a. would be paid in case of default in payment of monthly instalment and it has been the case of the appellant that the first respondent was not regular in paying the monthly instalments.

3. The vehicle in question met with an accident on 10th November, 1993 resulting into total loss of the vehicle by fire. By way of enforcement of the insurance policy of the vehicle in question, the first respondent filed a case against the United India Insurance Company before the Consumer Disputes Redressal Forum at Ahmedabad and the appellant was not impleaded as a party to the said proceedings. Ultimately, the claim was settled at Rs. 4,10,000/- with interest at the rate of 18 % per annum and the Insurance Company paid the amount to the first respondent inspite of the endorcement of Hire Purchase Agreement in favour of the appellant in the Registration Certificate of the vehicle in question. On 8th September, 1995, the first respondent paid Rs. 3,23,000. 35 ps. being the amount of all the outstanding instalment to the claimant. It has, however,

been the case of the appellant that the first respondent did not pay the additional charges at the rate of 36% p.a. which amounted to Rs. 1,08,200.37 ps. As against that, it has been the case of the first respondent that the said amount of Rs.3,23,000.35 ps. was paid in full and final settlement of the appellant's dues and the first respondent had paid the instalments as and when they accrued till upto the time when the vehicle in question stood destroyed by fire. Thus, according to the first respondent, following payments were made :

Rs. 76,011.69 Initial payment made to the dealer.
Rs. 84,365.00 Instalments paid upto the time when the truck in question stood destroyed in the accident.
Rs. 3,23,000.35Balance amount of instalments which included the finance charges.

Rs. 4,83,377.04 Total.

The stand of the first respondent is that the first respondent had incurred additional expenditure towards the building of the truck body That was the amount of Rs. 60,000/- (that is the part of compensation that the first respondent received from the insurance company. According to the first respondent, the first respondent still remained at a loss in view of the fact that as against the payment of Rs.4,83,377.04 ps., he received Rs.4,10,000/- only from the Insurance Company. That amount also included the amount spent by the first respondent towards the construction of truck body.

4. In the back ground of the aforesaid facts, the appellant issued notice for recovery of the additional finance charges claimed by the appellant. The appellant, therefore, invoked arbitration clause in the Hire Purchase Agreement which reads as under :

"(21)(a) All disputes, differences and/or claims, arising out of this Hire Purchase Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole Arbitration of an arbitrator nominated by the Managing Director of the Owner. The award given by such an Arbitrator shall be final and binding on all the parties to

this Agreement.

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred dying or being unable to act for any reason, the Managing Director of the Owner, at the time of such death of the arbitrator or his inability to act as arbitrator, shall appoint another person to act as arbitrator. Such a person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

(b) The venue of arbitration proceedings shall at at MADRAS."

The appellant saw to the matter being referred as per the aforesaid clause to the arbitration of the sole Arbitrator Mr. Subbaraiya Soma Sundaram, Retd. District & Sessions Judge at Madras. The learned Arbitrator, after conducting the proceedings, allowed the claim of the appellant and directed the respondents to pay to the appellant the claimed amount with interest thereon at the rate of 24% p.a. from 15th February, 1996 till the date of realization and the cost of arbitration proceedings amounting to Rs. 3,200/-.

The first respondent challenged the award by filing Civil Miscellaneous Application No. 373 of 1998 in the City Civil Court at Ahmedabad and the learned Judge of the City Civil Court (Court No. 20), under his judgment and order dated 6th February, 1998, allowed the application and the award of the learned sole Arbitrator dated 25th May, 1996 had been set aside with no order as to costs. That decision of the trial Court is under challenge in this Appeal from Order by virtue of the provision in section 37(1)(b) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the Act").

It has been submitted by Mr. Y.F.Mehta, learned advocate appearing for the respondents that the appellant ought to have preferred first appeal against the impugned judgment and order as by virtue of the relevant provisions of the Act, the trial Court finally adjudicated the challenge to the award made by the learned sole Arbitrator in favour of the appellant and against the respondents regarding the claim in the sum of Rs. 1,08,230.77 by way of setting aside the award under

the provisions of the Act.

According to his submissions, under the scheme of the Act, the award would be enforceable as a decree. Even under section 17 of the Arbitration Act, [X of 1940] 1940 (hereinafter referred to as "the old Act"), when the award is made rule of the Court, first appeal was the appellate remedy as the award in that case amounted to a decree. For the purpose of making good his submissions, he read before this Court the provision contained in section 36 of the Act and sought to get it compared with section 17 of the old Act. Section 36 of the Act reads as under :

> "36. Enforcement.- Where the time for making an application to set aside the arbitral award under sec. 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

Section 17 of the old Act reads as under :

> "17. Judgment in terms of award. - Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award. "

Having read the aforesaid two provisions in the Act as well as the old Act, Mr. Mehta submitted that for all practical purposes, the award under the Act would automatically become a decree of the Court if the time for setting aside the award as stated in section 34 has expired or if such an application having been made under section 34 of the Act has been refused and the award has not been set aside. Thus, according to Mr. Mehta, application for setting aside the award is an original proceeding before a civil court. He tried to make good his submission by reading before this court section 34 of

the Act. Same is contained in a separate Chapter namely Chapter VII with the heading "Recourse against Arbitral Award" and it contains only provisions of section 34 entitled as "application for setting aside the arbitral award". His submission is that the learned trial Judge set aside the award by virtue of the provisions of section 34 of the Act and, thereby, finally concluded the rights of the parties vis-a-vis award made by the learned sole Arbitrator.

Mr. Mehta, therefore, submitted that bearing in mind the aforesaid position of law, the provisions with regard to the appeals as appearing in section 37 under Chapter IX headed as "Appeals" in the Act will have to be considered and interpreted. Section 37 reads as under :

"37. Appealable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely,-

(a) granting or refusing to grant any measure under sec. 9.

(b) setting aside or refusing to set aside an arbitral award under sec. 34.

(2) Appeal shall also lie to a Court from an order of the arbitral tribunal.-

(a) according to the plea referred to sub-section (2) or sub-section (3) of sec. 16, or

(b) granting or refusing to grant an interim measure under sec. 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. "

According to the submission of Mr. Mehta, clause (b) of section 37 (1) quoted above confers right of appeal to either of the parties to an application for setting aside the arbitral award who has lost in the said application. The judgment and order upon such application would amount to final adjudication by the

Court authorized by law to hear such an application and, therefore, same would be appealable to the Court authorized by law to hear the appeals from original decrees. He, therefore, submitted that such an appeal would obviously be the first appeal and for that purpose, no reference is required to be made to any of the provisions of the Code of Civil Procedure, 1908. On a plain reading of section 37 quoted above, submission of Mr. Mehta would be that the appeal would be the first appeal and not an appeal from order as submitted by Mr. Gupta, learned advocate appearing for the appellant, as contemplated under section 104 of the Code of Civil Procedure. Mr. Mehta has laid stress on the word "the Court authorized by law to hear appeal from original decrees of the court passing the order" in sub-section (1) and the words "no second appeal" appearing in sub-sec. 3 thereof. He has finally submitted that the question need not be stretched any further inasmuch as the judgment and order upon an application for setting aside the arbitral award under section 34 of the Act would have an effect of finally concluding the rights of the parties concerning the award.

In reply, Mr. Gupta referred to the provisions of section 104 of the Code of Civil Procedure, 1908. He submitted that before passing of the Arbitration Act, 1940, some provisions which were incorporated in section 39 dealing with the appealable orders under the old Act were included in the provisions of section 104 of the Code of Civil Procedure. Upon passing of the old Act, said clauses were deleted. He fairly conceded that section 17 of the old Act which has been reproduced hereinabove did contain the provisions with regard to the filing of appeal against decree upon award being made a rule of the Court. He, therefore, submitted that there was clear distinction made and available in the old Act itself between the first appeals and the appeals from orders. He, however, had no answer to the fact that the practice of this Court was of registering the appeals as first appeals when an application for setting aside the award was finally decided by the trial Court. However, there being no distinction under the Act, as was available in the old Act, it would be only appeals from orders as contemplated under section 104 of the Code of Civil Procedure which would be an appropriate form of appellate remedy under section 37 of the Act.

Section 104 of the Code of Civil Procedure, 1908, therefore, might be reproduced:

"104. Orders from which appeal lies. -

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

(a) to (f) repealed by Act 10 of 1940.

[(ff) an order under section 35-A].

[(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be]

(g) an order under section 95.

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,

(i) any order made under rules from which an appeal is expressly allowed by rules:

[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of less amount, ought to have been made].

(2) No appeal shall lie from any order passed in appeal under this section."

Mr. Gupta pointed out that just as in sub-section (2) of section 104 quoted above, in section 37 of the Act also, there is a provision that no appeal would lie from the order passed in appeal under section 37 of the Act. In fact, the legislature has used the words "no second appeal" in section 37 of the Act unlike the words "no appeal" in aforesaid provision of sub-section (2) of section 104 of the Code of Civil Procedure. Therefore, the analogy which Mr. Gupta proposes to present will not apply for holding that the form of appeal under section 37(1)(b) would be that of appeal from order and not first appeal. Besides, remedy of appeal emanates from the relevant Statute, in the present case, the Act. Hence, what is important is to

find out the nature of the remedy as contained in section 37 of the Act itself.

5. In my opinion, the crucial test for finding out whether the appeal contemplated under section 37(1)(b) of the Act would be First Appeal or Appeal from Order is whether the rights of the parties concerning particular proceeding are finally adjudicated by the lower Court. In other words, whether the decision on the particular application under the Act would amount to final adjudication of the rights of the parties or not would be the real test for determining the remedy. As stated above, section 36 of the Act clearly provides for an award to be a decree which can be enforced in the same manner as if it were a decree of the Court, if an application to set aside the arbitral award under section 34 of the Act has not been preferred within the prescribed period of limitation or such an application has been refused [rejected]. The effect of the provision contained in section 36 would be that an application under section 34 for setting aside the arbitral award must be treated as a substantive proceeding so far as the rights of the parties to the award are concerned.Such proceedings are required to be undertaken before the Civil Court of principal original jurisdiction as defined under clause (e) of section 2 of the Act.

Mr. Mehta read following observations of the Honourable Supreme Court in case of Shankar Ramchandra Abhyankar v. Krishnaji Duttatraya Bapat, reported in AIR 1970 SC 1 ,in support of his submission about right to appeal conferred by a Statute. The Court, in para 5 and 6 of the citation, observed as under :

> "Such a right was one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which were required to constitute appellate jurisdiction were the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter."

Dealing with the revisional jurisdiction then, it has been observed :

> "Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court

below. Section 115 of the Code of Civil Procedure circumscribe the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. "

What is important is nature of the right to appeal which, in my opinion, emanates from the nature of the proceeding and the consequence of the Court's decision on the proceeding. If the proceeding stands terminated before the trial Court by the decision of that Court, the rights of the parties qua such proceeding would also stand finally adjudicated in that Court.

There is another aspect of the matter. It might be noted that section 37 of the Act in so far as it relates to the order of granting or dismissing an application for setting aside the award under section 34 of the Act is concerned, confers substantial right of appeal to a party against whom order under section 34 in such an application is passed. Any order that is passed in appeal will override the order which is subjected to appeal under section 37 of the Act. That is to say the order which is subjected to appeal would obviously stand merged into the order passed by the appellate Court in an appeal under section 37 of the Act.

6. Mr. Mehta made a reference to the decision of this Court in case of Patel Purshottamdas Motilal v. Patel Chhotabhai Motibhai reported in 1979(2) GLR 918 for pointing out the practice of this Court that first appeal was being filed against an order passed by the lower Court in an application to set aside the arbitral award. In the case of Patel Purshottamdas (supra), the Division Bench of this Court observed in paragraph 8 as under :

"If the Court has refused to set aside the award on merits, indeed the order is appealable; but if the Court has refused to set it aside on the ground of limitation, even then, it is a refusal to set aside the award. In our opinion, therefore, since in the instant case the learned Judge refused to set aside the award on the ground that objections to it filed by the plaintiff were barred by time, the order made by him was appealable under sec. 39(1)(vi). The

objection raised by Mr. Majmudar that the appeal is not maintainable cannot, therefore, succeed. Indeed in the instant case, the plaintiff has out of abundant caution instituted the appeal as well as the Revision Application."

It might at once be noted that the Court was dealing with the first appeal no. 786 of 1978 alongwith Civil Revision Application No. 591 of 1978 which would indicate that the practice of this court was one of filing the first appeal.

Mr. Gupta referred to the decision in the case of Societe Commercial De Coreales and Financiers S.A. v. State Trading Corporation of India & Anr., 1998 (39) GLR 744. However, that decision will not be applicable to the nature of proceeding which has been for consideration in this appeal. What the Court in that case was required to deal with was the prayer to stay the suit under the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 and this Court in appeal from order, held that the proceedings of the suit were required to be stayed.

There is one more aspect of the matter. That is with regard to the revenue of the State in the form of Court fees. It is obvious, in first appeal, the Court fees that would be required to be paid would be on higher side than the Court fees that would be required to be paid in an appeal from order. However, the main consideration is with regard to the rights of the parties in the two different forms of remedies. It is obvious that in an appeal from order, rights of the parties would be limited whereas in the first appeal, rights of the parties would be better and larger in nature.

7. In above view of the matter, the appeal which has been filed by the present appellant cannot be said to be maintainable as appeal from order.

[8. At the out set, Mr. Gupta was called upon to say whether he wanted the present appeal converted from appeal from order into first appeal. Mr. Gupta expressed that he did not want this appeal to be converted into first appeal. He has not been present throughout the time when this judgment has been under dictation. Under such circumstances, there is no other course except to dismiss this appeal as not maintainable at law. No opinion has, therefore, been expressed on the

main challenge to the impugned decision. This is done in order to see that no prejudice is caused to either of the parties.

9. In the result, this appeal is dismissed as not maintainable at law reserving liberty to the appellant to file first appeal alongwith an application for condonation of delay, if any, presenting time in prosecuting this appeal from order as one of the grounds for such condonation. No order as to cost.]

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After the aforesaid judgment was dictated and pronounced but before it could be signed, following provision in the Gujarat High Court Rules, 1993 has been brought to the notice of this Court. The provision is contained in Chapter 20 under the Head "Appeals under Special Acts".

"217. Hearing of appeals by Division Bench.-
All appeals under the Special Acts required to be filed in High Court shall be registered as First Appeals and shall be dealt with according to the procedure prescribed for first appeals under the Special Acts and/or Rules made thereunder and in absence of any such prescription in the Special Acts shall be governed by the procedure prescribed in these Rules in relation to the regular First Appeals under the Code of Civil Procedure. "

In my opinion, the aforesaid rule will put an end to the controversy resolved in the aforesaid judgment. In any case, decision rendered above coincides with the above rule.

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